

BEFORE THE  
SURFACE TRANSPORTATION BOARD

217295

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STB Finance Docket No. 34905

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VILLAGE OF CROTON-ON-HUDSON, NEW YORK

v.

BUFFALO SOUTHERN RAILROAD, INC., *et al.*

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**MOTION TO DISMISS COMPLAINT AS TO  
GREENTREE REALTY, LLC**

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Dated: August 15, 2006

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Greentree Realty, LLC ("Greentree") hereby moves the Surface Transportation Board ("STB" or "Board") to dismiss the Formal Complaint (the "Complaint") filed by Village of Croton-on-Hudson, New York ("Croton") against Greentree in this proceeding. In support of its motion, Greentree represents the following:

**GROUND FOR DISMISSAL**

The Complaint should be dismissed as to Greentree. Greentree is a non-carrier corporation that does not own or control any rail assets or rail carriers, nor is Greentree affiliated with any company that owns or controls rail assets or rail carriers. Greentree merely owns real property and is thus not subject to the jurisdiction of the Board. As such, Greentree cannot be found in violation of 49 U.S.C. §10902 ("Section 10902") and it was improper to bring a complaint against a non-carrier pursuant to 49 U.S.C. §11701.

To the extent the Complaint seeks to impose penalties against Greentree for allegedly authorizing, consenting to, or permitting a violation of Section 10902, that request is based on 49 U.S.C. §11901(c) ("Section 11901(c)"). Complaint at p. 10. Yet, Section 11901(c) does not provide a private right of action, but instead is directed at providing the United States with statutory authority to pursue civil penalties against persons who may have aided and abetted a violation of Section 10902, and pursuant to 49 U.S.C. §11703, such actions can only be instituted by the Attorney General. Furthermore, the proper venue for any action under Section 10902 is in court pursuant to 49 U.S.C. §11901(f), not before the Board.

Alternatively, assuming *arguendo* that the Board concludes that Greentree is subject to the Board's jurisdiction and that a private party (rather than the Attorney General) may pursue an action under Section 11901(c) before the Board (rather than in court), Greentree offers, without admitting the truth or falsity of the allegations against it except as admitted in its answer filed August 1, 2006, to pay the maximum civil fine assessable against Greentree under the statute - \$5,000.00 – on the condition that the Board promptly dismisses the Complaint as to Greentree. Greentree makes this offer *solely* because it would be more economical to pay a \$5,000.00 fine than to engage in extended, multi-party litigation of this matter before the Board.

#### **ARGUMENT**

A. As A Non-Carrier That Does Not Own Or Control Rail Assets or Rail Carriers, Greentree Is Not Subject To The Board's Jurisdiction And Cannot Be Found In Violation Of Section 10902

The Complaint's entire focus centers around whether Buffalo Southern Railroad, Inc.'s ("BSOR's") acquisition and operation of approximately 1600 feet of track lying on property owned by Greentree was done in violation of 49 U.S.C. §10902. The Complaint was brought pursuant to 49 U.S.C. § 11701. That provision provides authority for "a person, including a

governmental authority” to file a complaint about “a violation of this part [49 U.S.C. Subtitle IV, Part A] by a *rail carrier* providing transportation or service *subject to the jurisdiction of the Board* under this part.” (emphasis supplied). BSOR is clearly a rail carrier subject to the Board’s jurisdiction for which a complaint may lie; however, Croton has also filed its complaint against Greentree. Greentree is a non-carrier limited liability company that does not own or control any rail carriers, nor is Greentree affiliated with any company that owns or controls rail assets or rail carriers. It merely owns the land on which the tracks operated by BSOR lie.

Furthermore, Greentree has no direct privity of contract with BSOR. Greentree merely leased its property to RS Acquisition Co., LLC (“RS”), who then in turn, leased it to BSOR. BSOR is RS’s tenant, not Greentree’s. Greentree has never had any dealings with BSOR and has no contractual relationship with BSOR (except to the extent that RS’s ability to contract with BSOR may be impacted by Greentree’s lease to RS). Rather, Greentree’s dealings are with RS. To the best of Greentree’s knowledge, RS is not a rail carrier and does not own or operate rail carriers.

Because a complaint can only be brought against a carrier subject to the Board’s jurisdiction, the Complaint should be dismissed as to Greentree, a non-carrier which is not affiliated with a carrier.<sup>1</sup> See generally Ellis v. Interstate Commerce Commission, 237 U.S. 434 (1915) (holding that a provider of rail cars, which was not a carrier, was beyond the ICC’s investigatory reach as a potential respondent, and was only subject to being a witness); Tri-State Brick And Stone Of New York, Inc. And Tri-State Transportation Inc. – Petition For Declaratory

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<sup>1</sup> A rail carrier is a person providing common carrier transportation by rail. 49 U.S.C. §10102(5). Even if, arguably, property on which a rail line lies were considered “transportation” under the statute, the fact that Greentree is not a carrier (and is not related to a carrier) means that its mere ownership of land is not sufficient to subject it to the Board’s jurisdiction, which applies only to “transportation by a rail carrier.” 49 U.S.C. §10501(a)(1).

Order, STB Finance Docket No. 34824 (STB served Aug. 11, 2006) (“To be within the Board’s jurisdiction, the transportation activities must be performed by a rail carrier (either directly or under its auspices)).” Because Greentree is not a rail carrier, and is not even affiliated with a rail carrier, it is not an appropriate defendant in an action before the Board.

B. Section 11901(c) Is An Enforcement Provision And Actions Under That Section Can Only Be Brought In Court By The United States Attorney General

Perhaps realizing the difficulty of bringing a complaint against a non-carrier that is not even subject to the Board’s jurisdiction, Croton has attempted to bootstrap Greentree into its Complaint against BSOR by citing to Section 11901(c) and claiming that Greentree was knowingly authorizing, consenting to, or permitting BSOR to violation Section 10902.<sup>2</sup> Even assuming the merits of that assertion, Section 11901(c) is still not an independent jurisdictional basis for filing a complaint against a non-carrier. Instead, Section 11901 has always been the vehicle by which the Board can seek to impose penalties against parties who have violated previous Board orders. See Delaware And Hudson Railway Company – Lease And Trackage Rights Exemption – Springfield Terminal Railway Company, ICC Finance Docket No. 30965, 1990 ICC LEXIS 362, \*27 (ICC decided Nov. 14, 1990) (“Our authority to levy penalties on carriers for violation of Commission orders is well settled. See, generally, 49 U.S.C. 11901.”). Section 11901 is an enforcement and penalty provision. It does not provide an independent private right of action for which a party can bring a complaint at the Board. It is directed at

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<sup>2</sup> Croton’s claim that Greentree *knowingly* abetted a violation of Section 10902 is particularly suspect inasmuch as Croton felt compelled to offer expert testimony in related judicial proceedings on the alleged need for BSOR to obtain Section 10902 authority. Was Greentree required to hire an expert to advise it on the legal implications of the activities of its tenant’s subtenant in order to avoid a violation of Section 11901(c)?

providing the United States with statutory authority to pursue civil penalties against persons who may have aided and abetted a violation of Section 10902.<sup>3</sup>

Furthermore, under 49 U.S.C. §11703, any action to seek penalties against violations of the ICC Termination Act can only be instituted by the Attorney General, not by Croton. Section 11901(f) says that liability under Subsections 11901(a - e) is enforced by a "civil action." Section 11703 says that the Attorney General, not the Board, may bring civil actions to enforce "this part," which includes Section 11901(c). *See United States of America v. Alky Enterprises, Inc.*, 1992 U.S. Dist. LEXIS 13735 (D. N.H. Aug. 16, 1992), at \*6 - \*7 ("[I]t appears that the ICC does not have the authority to initiate a suit for civil damages under its own name. Rather, such suit is initiated by the Justice Department. *See* 49 U.S.C. § 11703(a)."). Section 11901(c) does not create a private cause of action. *See generally Siegel Transfer, Inc., et al. v. Carrier Express, Inc., et al.*, 856 F. Supp. 990, 1994 U.S. Dist. LEXIS 8890 (E.D. Pa. July 1, 1994), *aff'd in pertinent part* 54 F.3d 1125 (3d Cir. 1995) ("The only sections cited . . . are sections 10741(a), 10749, 10761, 10762, and 11901 and the Elkins Act, 49 U.S.C. §§11902, 11903 and 11915. None of these sections contains an enforcement provision permitting a private litigant to bring an action in federal court to remedy an alleged violation of the section."). Croton simply does not have the statutory authority to bring an action against Greentree at the Board because such actions can only be brought by the Department of Justice, not Croton.

Furthermore, even if one assumes that a private party, and not just the Attorney General, could bring a private action under Section 11901(c) against a non-carrier not even subject to the

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<sup>3</sup> As a penal statute, Section 11901 must be read narrowly, according to its specific terms. *See, e.g., United States v. Northern Pacific Railway*, 242 U.S. 190, 193 (1916) ("The statute [Section 20 of the Act to Regulate Commerce] is a penal one, and should be applied only to cases coming plainly within its terms."), and *United States v. Hays Roofing & Supply, Inc.*, 490 F.2d 1190, 1193 (9<sup>th</sup> Cir. 1974) ("The punitive character of civil forfeiture requires a restrictive reading of the statute.").

jurisdiction of the Board, such as Greentree, such a complaint under that Section still must be brought in court, not at the Board. Section 11901(f) specifically requires that actions under Subsections 11901(a - e) be brought in court. "Trial in a civil action under subsections (a) through (e) of this section is in the judicial district in which the rail carrier has its principal office or in a district through which the railroad of the rail carrier runs." *See Southern Pacific Transportation Co. v. Commercial Metals Co.*, 456 U.S. 336, 349-350 (1982) (the ICC had the power to enforce credit regulations by "bringing a suit for the \$5,000 civil forfeiture"). In short, the Board is not the right venue for either enforcement of penalties under Section 11901(c) or for holding a trial with respect to whether or not there has been a violation of that section.

C. Greentree Is Willing To Pay A \$5,000 Penalty To Save Litigation Costs And Assuming Greentree Is Dismissed From The Complaint

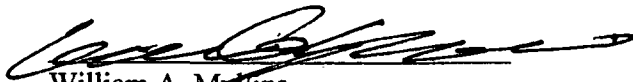
Alternatively, in the event that the Board refuses to dismiss the Complaint as to Greentree on the foregoing grounds, it should conditionally dismiss as to Greentree, subject to Greentree's tendering to the Board the maximum fine which could be levied against Greentree under Section 11901(c) - \$5,000.00. Apparently Croton seeks to conduct an extended proceeding before the Board, having filed a proposed schedule for the proceeding that takes the case well into next year. Participation in such a proceeding - responding to discovery and making filings - would cost Greentree well more than \$5,000.00.

Assuming that Section 11901(c) may be applied to Greentree, the maximum penalty to which Greentree would be subject under that statute would be \$5,000.00. That is, while subsections (a), (b), (d) and (e) state that they apply "for each violation" or "for each day the violation continues," subsection (c) says simply that a person charged thereunder "is liable to the United States Government for a civil penalty of not more than \$5,000." Accordingly, the maximum penalty that could be assessed against Greentree under Croton's complaint is

\$5,000.00, and nothing more. Therefore, should the Board refuse to dismiss the complaint against Greentree on grounds Nos. 1 - 3 above, Greentree hereby offers to tender to the Board the maximum penalty that could be assessed against it under the statute - \$5,000.00 - without admitting the allegations against it, simply as a cost-savings measure.

**WHEREFORE**, Greentree Realty, LLC requests that the Complaint be dismissed with prejudice as to Greentree and that no relief of any kind be awarded against Greentree, or, if it fails to dismiss the Complaint against Greentree on said grounds, that the Board explicitly find that Greentree's maximum fine with respect to the Complaint is \$5,000.00 and that the Board order the Complaint dismissed as to Greentree with prejudice, without making a finding of the truth or falsity of the allegations against Greentree, upon Greentree's submission to the Secretary of the Board of said \$5,000.00 payment made payable to Treasurer of the United States.

Respectfully submitted,



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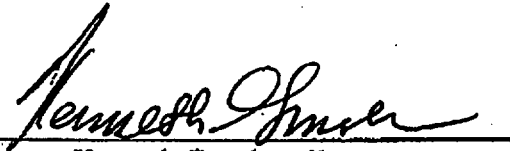
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**DECLARATION**

Kenneth Gunshor declares under the penalties of perjury pursuant to 28 U.S.C. § 1746 as follows: I have read the foregoing statement, knows the facts asserted there are true and that the same are true as stated.

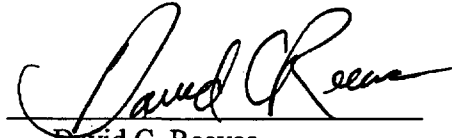
I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 15, 2006

  
Kenneth Gunshor, Esq.

### **CERTIFICATE OF SERVICE**

I hereby certify that on August 15, 2006 I have caused a copy of the foregoing Motion of Greentree Realty LLC to Dismiss, to be served upon all parties of record first class mail, postage prepaid or by more expeditious means of service.

A handwritten signature in black ink, appearing to read "David C. Reeves", is written over a horizontal line.

David C. Reeves

Attorney for Greentree Realty, LLC